SUPREME COURT, U.S.

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IN THE

Supreme Court of the United States

October Term, 1964.

No. 424

OUTDOOR AMERICAN CORPORATION, G. & L. DISTRIBUTORS and GEORGE ROSENBLOOM,

Petitioners,

vs.

CITY OF PHILADELPHIA, HOWARD R. LEARY, JAMES C. CRUMLISH, JR., THE EVENING BULLETIN, TRIANGLE PUBLICATIONS, INC., and COLUMBIA BROADCASTING SYSTEM, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above entitled case on June 30, 1964.

OPINIONS BELOW.

The opinion of the District Court for the Eastern District of Pennsylvania is unreported[1] and printed in the Appendix p. 11a, hereto, infra. The opinion of the United States Court of Appeals for the Third Circuit is unreported and is printed in the Appendix, infra, p. 21a.

JURISDICTION.

The judgment of the Court of Appeals for the Third Circuit was entered on June 30, 1964. A hearing was denied on July 21, 1964. The jurisdiction of this court is invoked under 28 U. S. C. Sec. 1254 (1).

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[1] See **Outdoor American Corp. v. City of Phila.**, No. 34316 (E. D. Pa. November 20, 1963, Legal Intelligencer, Dec. 6, 1963).

QUESTIONS PRESENTED.

1. Whether petitioners have the right under the First and Fourteenth Amendments to a hearing as to obscenity under a state obscenity statute before their publications can be confiscated by the police?

2. Whether Federal Courts should exercise their jurisdiction under the Civil Rights Act to protect that right?

STATUTES INVOLVED.

The statutory provisions involved are the Federal Civil Rights Statutes, Section 1343, (3) of Title 28, United States Code. This Act provides in material part:

> "The District Courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> * * * * * * * * *
>
> "(3) To redress the deprivation, under color of any state law . . . . of any right, privilege or immunity secured by the Constitution of the United States."

The Constitutional provisions involved are the First and Fourteenth Amendments. The First Amendment reads as follows:

> "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peacefully to assemble, and to petition the government for a redress of grievances."

The Fourteenth Amendment (Section 1.) reads as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

STATEMENT OF THE CASE.

The Petitioners are publishers and distributors of nudist literature. Petitioner Outdoor American Corporation publishes nudist magazines and paperback books and ships them throughout the United States. Petitioner G. & L. Distributors is a partnership engaged in the wholesale distribution and sale of magazines and paperback books in Philadelphia and elsewhere. Petitioner George L. Rosenbloom is one of the owners and operators of G. & L. Distributors.

A Pennsylvania statute[1] makes it a felony to deal in ob-

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[1] Act of 1939, June 24, P. L. 874, Sec. 524 as amended, 18 Purdon's Stat. Ann., Sec. 4524:

Whoever sells, lends, distributes, exhibits, gives away or shows or offers to sell, lend, distribute, exhibit or give away or show, or has in his possession with intent to sell, lend, distribute or give away or to show, or knowingly advertises in any manner any obscene literature, book, magazine, pamphlet, newspaper, storypaper, writing, drawing, photograph, figure or image, or any written or printed matter of an obscene nature, or any article or instrument of an obscene nature, or whoever designs, copies, draws, photographs, prints, utters, publishes or in any manner manufactures or prepares any such book, picture, drawing, magazine, pamphlet, newspaper, storypaper, paper, writing, figure, image, matter, article or thing, or whoever writes, prints, publishes or utters or causes to be printed, published or uttered, any advertisement or notice of any kind giving information, directly or indirectly, stating or purporting to state where, how, of whom, or by what means any obscene book, picture, writing, paper, figure, image, matter, article or thing named in this section can be purchased, obtained or had, or whoever hires, employs, uses or permits any minor or child to do or assist in doing any act or thing mentioned in this section is guilty of a felony, and upon conviction, shall be sentenced to imprisonment not exceeding two (2) years, or to pay a fine not exceeding two thousand dollars ($2000), or both.

"Obscene," as used in this section, means that which, to the average person applying contemporary community standards, has as its dominant theme, taken as a whole, an appeal to prurient interest.

scene publications. The statute prescribes no procedure for the confiscation of allegedly obscene publications.

On October 1, 1963, Petitioner Rosenbloom was arrested for distributing obscene material. Without any search warrant the police searched his parked truck. After sifting through large numbers of magazines and paperback books, the police confiscated several hundred items.[2]

On October 3, 1963 and October 4, 1963, the police secured search and seizure warrants that gave them general authority to search for and seize material of an obscene nature.[3] The warrant did not describe petitioners' publications and contained no standards or other guides. The police searched Rosenbloom's home and a storage area not connected with his home. On this occasion the police confiscated duplicate copies of the publications taken three days earlier. These amounted to several thousand publications and constituted Petitioners' entire supply of these particular publications in the Philadelphia area.[4]

Seven months later, in May 1964, Petitioner Rosenbloom was found not guilty of the alleged obscenity charges and some of his publications were returned to him. The balance are still impounded for use as evidence against other defendants still under arrest.

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[2] At the same time twenty-two retail news dealers were also arrested as part of a city-wide raid. Allegedly obscene materials were confiscated from these sources as well. Some of Petitioners' materials are still retained by police for use as evidence in connection with the trials of some of these other persons.

[3] The warrants were secured on the basis of affidavits by police officers which stated and gave authority to seize, "paraphernalia pertaining to obscene literature," and "obscene books."

[4] Involved are nine magazines and two paperback books. The former and one of the paperbacks contained pictures of nude persons taken at nudist camps and articles about their activities and about the nudist movement. The other paperback book confiscated contained no pictures; it is a narrative history of the nudist movement.

After the seizure and confiscation Petitioners filed a civil complaint for relief under the Civil Rights Act, 42 U. S. C., Sec. 1983 and 28 U. S. C., Sec. 1343, in the United States District Court for the Eastern District of Pennsylvania. Petitioners' suit sought, among other things, an injunction against further police interference with their rights and for return of their publications. Petitioners contended that they had a constitutional right to a judicial determination of obscenity before their property could be seized by police.

Petitioners' suit was dismissed on defendants' motion. This was affirmed by the United States Court of Appeals for the Third Circuit, which also denied a petition for rehearing.[3]

As noted, the fundamental thrust of Petitioners' position before both Courts below was that it was in violation of their constitutional rights, as interpreted by the decisions of this Court, to confiscate their property prior to a judicial determination that their possession and distribution were violations of the Pennsylvania Obscenity Statute.

The Court of Appeals affirmed the District Court's action on the grounds, among others, that it could not interfere with the State Court's function of determining obscenity.

REASONS FOR GRANTING THE WRIT.

1. The judgment below is in direct conflict with decisions of this Court.

In *A Quantity of Copies of Books, et al. v. Kansas*, —— U. S. —— (June 22, 1964, 32 U. S. Law Week 4658) and

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[3] Petitioners' complaint named six defendants. Three of them were news media who were dropped upon Petitioners' appeal. The appeal was prosecuted only against the remaining three defendants.

Marcus v. Search Warrant, 367 U. S. 717 (1961), this Court held that it violated the First and Fourteenth Amendments to confiscate materials under an obscenity statute prior to a hearing and determination of obscenity.

In the latter case, the warrant gave the police virtually unlimited authority to seize any matter they considered obscene; the verified complaint which was the basis for the warrant did not include any specific description of the allegedly obscene item, and there was no prior submission to the judge who issued the warrant.

This Court said (361 U. S. at 153):

> "It follows that, under the Fourteenth Amendment, a State is not free to adopt whatever procedures it pleases for dealing with obscenity as here involved without regard to the possible consequences for constitutionally protected speech."

In the *Books* case, both by procedure prescribed by statute and by additional steps taken by the prosecuting authorities, the items to be confiscated were specifically described and were in part "scrutinized" by the judge who eventually issued the seizure order. Only those items were confiscated. Hearing on the merits was had some weeks later, after earlier denial of defendant's motion to dismiss the seizure on the same constitutional grounds urged here.

Despite the fact that the extra steps noted above were taken to avoid *Marcus*, this Court held that the absence of any hearing prior to seizure rendered the procedures "constitutionally deficient". Mr. Justice Brennan said (32 U. S. Law Week at 4659):

> "We hold that the procedures followed in issuing the warrant for the seizure of the books, and authorizing their impounding pending hearing were constitution-

ally insufficient because they did not adequately safeguard against the suppression of nonobscene books."

The practical importance of this rule is best illustrated where, as here, the material suppressed is subsequently determined to be nonobscene.

The facts in the present case are virtually identical to those in *Marcus*. The inevitable result of those facts is identical to what happened in both *Marcus* and *Books*: a confiscation of Petitioners' property on grounds of alleged obscenity, prior to any determination of obscenity. As held in the two cited cases, this violates Petitioners' constitutional rights under the First and Fourteenth Amendments.

The Court below therefore missed the mark in refusing to give relief, because to do so would "ambush the state courts by deciding the fundamental basis of obscenity" (—— F. 2d at ——, p. 24a of App.). Petitioners were not seeking any such decision or any other interference with the state court proceeding. Petitioners were entitled to and asked only for the return of their property and freedom from further harassment until the state court could make its own determination of obscenity in accordance with usual state court procedures.

The Circuit Court of Appeals said also: "If held obscene, plaintiff cannot complain of confiscation." This is directly in conflict with *Marcus* and *Books*. The exact teaching of those cases is that petitioners are not required to sit mute awaiting trial in the state criminal court while their property continues confiscated and their constitutional rights continue violated. Merely because there was a guarantee of a fair trial has nothing to do with their rights in the interim.

It appears that the court below placed concern for interference with state court proceedings over interest in petitioners' constitutional rights. As noted, there is no effort

here to by-pass the state court's jurisdiction to determine obscenity. Petitioners' complaint is rather the violation of their constitutional rights pending that determination. This is the proper function of the federal court and does not reach the merits of the question of obscenity which is left solely with the state courts. Nonetheless the Court of Appeals said:

> "No doubt defendants intend to enforce the Pennsylvania statute against plaintiffs' publications until final adjudication of their obscenity."

This is flatly in conflict with *Marcus* and *Books*.

The Court went on to explain that Petitioners had no basis for assuming that the state officials would not observe the final outcome of the criminal proceedings and that plaintiffs' inconvenience and loss "were no more than what is incidental to every criminal proceeding brought lawfully and in good faith."

This too misses the mark as to the very heart of the case. The very question involved is whether the proceeding was "brought lawfully". Petitioners contend that *Marcus* and *Books* hold it was not. As this court said in *Books*, the constitutional deficiencies were not cured by the subsequent "full hearing".[6] So here: observance by the state authorities of Petitioners' other rights does not correct the earlier confiscation which constituted an unconstitutional previous restraint and censorship. The error of the court below is demonstrated further by its reference in a footnote to *Grove Press, Inc. v. Calissi*, 208 F. Supp. 580 (N. J. 1962) and *Toth v. Gilbert*, 184 F. Supp. 163 (N. D. Ohio, 1960). Neither case dealt with the only question involved here.

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[6] See also **Monroe v. Pope**, 365 U. S. 167 (1961); **McNeese v. Board of Education**, 373 U. S. 668 (1963); **Cantwell v. State of Conn.**, 310 U. S. 296 (1940).

namely the constitutionality of the confiscation prior to an adversary determination of obscenity. Rather both cases involved a request that the Federal court intervene, suspend or otherwise deal with the actual criminal proceedings in the state court.

2. The question presented is of far-reaching importance in the administration of the Pennsylvania and other similar statutes and in the protection of the constitutional guarantee against suppression of freedom of speech and the press. In addition the rule enunciated in the judgment below can serve as a dangerous precedent in other areas involving the interpretation of the First and Fourteenth Amendments.[7]

Questions involving freedom of speech and prior restraint have been before this Court with comparative frequency. This is illustrated by the *Marcus* and *Books* cases and by the other cases cited in those opinions. It is further illustrated by the fact that the latter case involved four opinions by the justices of this Court. In these circumstances, it is of obvious importance that the judgment below be reviewed by this Court. This is especially true if, as Petitioners have noted above, the judgment below is in direct conflict with this Court's decisions in *Marcus* and *Books*.

The public interest in this case is further illustrated by the fact that the obscenity statute of at least one other state has been reviewed recently in the same context as applies here. In *Evergreen Review, Inc. v. William Cahn, District Attorney, County of Nassau, State of New York*, —— F.

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[7] In an opinion dated Aug. 12, 1964, the same District Court judge who heard the instant case cited the opinion of the Court below in support of his reluctance to "interfere". **Dale Book Co., Inc. v. Leary, et al.**, —— F. S. —— (E. D. Pa. 1964). That opinion quotes and relies upon the very language quoted in this petition as illustrating the conflict with **Marcus** and **Books.**

Supp. —— (E. D. N. Y. June 11, 1964, Docket No. 64-C-441), the court set aside as unconstitutional the same type of prior restraint as has been approved by the judgment below.

A three-judge court convened pursuant to the Federal Civil Rights Act dealt with the New York State Penal Law under which a warrant had issued for the confiscation and delivery to the Court of "indecent, obscene and pornographic magazines using the name 'Evergreen'". On the same day on which the search occurred the same judge examined an appropriate sample of the allegedly obscene items and authorized the issuance of an Information. Warrants of arrest were issued and the balance of the defendant's supplies were confiscated.

Citing *Marcus* the Court held that the procedure followed there constituted a "technique . . . . expressly condemned in *Marcus*" and an unconstitutional "means of wholesale suppression of allegedly obscene and pornographic material prior to any adversary proceeding or a judicial scrutiny or superintendence so necessary for the protection of non-obscene material." [8]

If the procedures followed here, which, petitioners contend, are expressly forbidden in both *Marcus* and *Books*, are allowed to stand, the effect of the judgment of the court below that petitioners must await the exhaustion of state remedies is to render ineffective petitioner's constitutional right to free speech and press. There would be nothing to prevent the reinstitution of these same illegal procedures again and again. Under the Civil Rights Statute the federal courts have the means through equitable power to insure the requirement of an adversary determination on the question of obscenity prior to mass seizure when a state does not act to grant the required relief. Refusal to exer-

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[8] The opinion is printed in appendix b attached to this petition.

cise that power results in violation of petitioners' constitutional rights and raises serious questions in the application of the Pennsylvania and similar statutes.

CONCLUSION.

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

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APPENDIX b.

UNITED STATES DISTRICT COURT.

EASTERN DISTRICT OF NEW YORK.

EVERGREEN REVIEW, INC.,
Plaintiff,
against
WILLIAM CAHN, District Attorney, County of Nassau, State of New York,
Defendant.

64-C-441.
June 11, 1964.

OPINION.

Before: HAYS, Circuit Judge, and ROSLING and BARTELS, District Judges.

PER CURIAM.

The complaint in this action, brought under the Federal Civil Rights Law (42 U. S. C. §1983), attacks as unconstitutional the seizure by the District Attorney of Nassau County under Sections 1141 and 1144 of the New York State Penal Law, of approximately 21,000 copies of the

magazine "Evergreen Review" claimed to be obscene and pornographic. It seeks injunctive relief, damages and a declaratory judgment of unconstitutionality, and states that the action is to be tried and determined by a three-judge court pursuant to Sections 2281 and 2284, 28 U. S. C. Upon plaintiff's application the District Judge ordered defendant to show cause why he should not be directed to return the seized copies of plaintiff's magazine and be enjoined during the pendency of this action from interfering with the manufacture, distribution or sale thereof, and pending the determination of this application, temporarily restrained defendant from disposing of the copies of the magazine. During the argument before the three-judge court defendant filed a comprehensive motion to dismiss the complaint, dissolve the three-judge court and stay the proceedings until the outcome of certain criminal actions now pending in the State courts. The Attorney General of the State of New York also appeared and joined in defendant's motion. Subsequently, the defendant and the Attorney General filed briefs in support of this motion, which were duly considered.

Facts.

On April 24, 1964, Albert C. Anderson, a detective in the Nassau County Police Department assigned to the District Attorney's Squad, submitted an affidavit[1] to a Nassau

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[1] The text of the affidavit is as follows:

"I am a Detective in the Nassau County Police Department, assigned to the District Attorney's Squad.

That on April 24th, 1964, a confidential informant related the following information to me at the Office of the District Attorney of the County of Nassau, New York.

That my informant had been employed at the premises doing business as CORYDON M. JOHNSON CO., INC., which is located

County Judge predicated upon information furnished him by "a confidential informant" employed on the premises of Corydon M. Johnson Co., Inc., where the magazine "Evergreen Review" was being bound, to the effect that she had informed Anderson that while working in the bindery she

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on Route 107, Hicksville Road, Bethpage, County of Nassau, New York, and was working in the department for final preparation of binding for magazines. My informant further stated to me that a magazine using the name 'EVERGREEN' was being prepared for completion and that while working my informant observed black and white photographs in the magazine which showed nude human forms, possibly male and female, but reputed by fellow workers to be two females, and that the forms portrayed various poses and positions indicating sexual relations. My informant further stated having read portions of the printed material accompanying the aforesaid photographs and described the printed matter of consisting of four lettered obscene language.

In addition my information further stated to me of having seen such publications as PLAYBOY and similar magazines and stated there was no comparison between them. Further that one of the bosses of the premises made the statement, in the presence of my informant, that three thousand of the magazines were to be completed in one day.

My informant also stated that the aforesaid location has employed on a part time basis, students of high school age, who handle the magazine in question in connection with their work.

Based upon the foregoing reliable information there is probable cause to believe that obscene, indecent and pornographic magazines, using the name 'EVERGREEN' have been used or are possessed with intent to be used as the means of committing a crime, to wit: Violation of Section 1141 of the Penal Law of the State of New York and are being concealed within the premises doing business as CORYDON M. JOHNSON CO., INC., located at Route 107, Hicksville Road, Bethpage, County of Nassau, New York, occupied by JOHN DOE.

WHEREFORE, I respectfully request that the Court issue a Warrant and Order of Seizure, in the form annexed, authorizing the search of the premises doing business as CORYDON M. JOHNSON CO., INC., located at Route 107, Hicksville Road, Bethpage, County of Nassau, New York, and directing that if such property or evidence or any part thereof be found that it be seized and brought before the Court; together with such other and further relief that the Court may deem proper.

No previous application in this matter has been made in this or any other Court or to any other Judge, Justice or Magistrate."

observed black and white photographs in the magazine "Evergreen Review" "which showed nude human forms, possibly male and female, but reputed by fellow workers to be two females, and that the forms portrayed various poses and positions indicating sexual relations", and that the printed material accompanying the photographs consisted of four lettered obscene language. "Based upon the foregoing reliable information," Anderson concludes, "there is probable cause to believe that obscene, indecent and pornographic magazines" are being used or possessed with intent to be used for the purpose of committing a crime in violation of Section 1141 of the Penal Law. Upon this affidavit the County Judge issued a warrant pursuant to Section 1144 of the Penal Law[2] that there was "probable cause for believing that certain property has been used or is possessed with intent to be used as the means of committing a crime, to wit: Violation of Section 1141 of the Penal Law of the State of New York," authorizing a search of the bindery and a seizure of such property which "may have been delivered for indecent, obscene and pornographic magazines using the name 'Evergreen' " and to bring such property before the court. Pursuant thereto, seizure of approximately 21,000 copies of the magazine was made on the

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[2] Section 1144 provides in part that

"A magistrate having jurisdiction to issue warrants in criminal cases, upon complaint that any person within his jurisdiction is offending against the provisions of this article, supported by oath or affirmation, must issue a warrant, directed to the sheriff or to any constable, marshal, or police officer within the county, directing him to search for, seize, and take possession of any of the articles specified in this article, in the possession of the person against whom complaint is made. The magistrate must immediately transmit every article seized by virtue of the warrant, to the district attorney of the county, who must, upon the conviction of the person from whose possession the same was taken, cause it to be destroyed, and the fact of such destruction to be entered upon the records of the court in which the conviction is had."

same day by three County detectives. According to the affidavit of the managing editor, said 21,000 copies together with 4,000 copies previously mailed to subscribers, comprised the entire print run of the April-May 1964 issue.

After the seizure and the initiation of this action, Anderson in a subsequent affidavit, sworn to May 16, 1964 and filed in support of the defendant's motion, stated that after reading his affidavit the County Judge questioned him "with respect to the source and nature of my information" and then decided the affidavit was sufficient for a search warrant. He further explains therein how the seizure occurred and states that on April 24th he proceeded to the bindery with two other detectives and a search warrant and then seized two copies of the magazine and returned to the District Attorney's office with said copies but leaving the other detectives on the premises of the bindery. He adds that the District Attorney then read the magazine[3] and ordered Anderson to draw up an information alleging violation of Section 1141 of the Penal Law and to present the same to a District Judge; that upon such presentation the same Nassau County Judge on the same day read the magazine and decided that it was pornographic and thereupon authorized the information against the plaintiff, its officers, Barney Rosset and Richard Seaver, and against Pegasus Press, Inc., the company printing the magazine, and its president, George Haralampoudis, and that warrants of arrest (not of seizure) were then issued by another judge against the alleged offenders. Upon execution of the arrest warrants, copies of the magazine were loaded upon vehicles and delivered to the Property Clerk of the Police Department.

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[3] A search warrant gains no support from investigations and observations after it is signed. **Tripodi v. Morgenthau,** S. D. N. Y. 1962, 213 F. Supp. 735; **United States v. Sims,** M. D. Tenn. 1962, 201 F. Supp. 405.

Anderson's affidavit of April 28th, filed before this action, states that upon execution of the April 24th warrant "Approximately Twenty One Thousand (21,000) bound and unbound copies of magazines known by the name 'EVERGREEN'" were seized "under and pursuant to the warrant". Criminal actions are now pending in the District Court of Nassau County against Gearge Haralampoudis and Pegasus Press, Inc.

In support of the defendant's motion to dismiss and for other relief, Henry P. Devine, Chief of the Law and Appeals Department of the Nassau County District Attorney's office, filed an affidavit, sworn to May 15, 1964, stating that he had read Anderson's affidavit of May 15th[4] and that "The procedure he [Anderson] describes was the procedure used by the District Attorney's office of the County of Nassau in this case" and "conforms, generally, to the practice of the District Attorney's office when complaints are received by the members of the District Attorney's staff, or by members of the Police Department where notice is given to the District Attorney's office."

The issues before this Court are (1) whether plaintiff's demand for an injunction to restrain the enforcement by the defendant of Sections 1141 and 1144 of the New York Penal Law by seizure of 21,000 copies of plaintiff's magazine, falls within the jurisdiction of a three-judge court as provided by Section 2281 of Title 28 of the United States Code and (2) if so, whether such application of said sections based upon a judge's warrant prior to the determination of the issue of obscenity, violates plaintiff's constitutional rights under the First, Fourth and Fourteenth Amendments.

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[4] Anderson's affidavit is sworn to May 16, 1964, which is a little confusing in the light of Devine's affidavit sworn to May 15th, stating that Devine had read Anderson's affidavit of May 15th.

I.

The threshold question to be decided is whether the three-judge court was properly invoked. Since Section 2281 procedure dislocates the normal operations of the Federal courts, the statute must be strictly construed according to its terms. It is not to be invoked to restrain the lawless exercise of authority by a state official in a unique or particular case, *Phillips v. United States*, 1941, 312 U. S. 246; *Penagaricano v. Allen Corporation*, 1 Cir. 1959, 267 F. 2d 550; nor when the controversy involves merely the construction of a state law, see *Kesler v. Department of Public Safety, etc.*, 1962, 369 U. S. 153; nor when the constitutional question is no longer open, *Bailey v. Patterson*, 1962, 369 U. S. 31. As remarked in *Ex parte Bransford*, 1940, 310 U. S. 354, it is necessary to distinguish between a petition which seeks an injunction on the ground of unconstitutionality of the result obtained by use of a statute not attacked as unconstitutional and a petition for an injunction on the ground of unconstitutionality of a statute as *applied*. Only the latter requires a three-judge court. Accordingly, if the complaint alleges a basis for equitable relief based upon unconstitutionality of a statute as applied, a single judge may not grant or withhold relief but must invoke the statutory court. *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 1962, 370 U. S. 713. These criteria have certainly been satisfied here and the three-judge court was properly invoked.

II.

In the interest of clarity, it should be stated that the plaintiff does not, in effect, assail the legislation insofar as it outlaws obscene and pornographic material and this issue is really not before this Court. In fact, the statute on its

face is not unconstitutional. The attack in this case is against the power of New York State to adopt a scheme of enforcing the prohibitions of Section 1141 by the methods set forth in Section 1144 as applied by the District Attorney.

The protection of freedom of press and speech provided by the First Amendment has by many classic decisions of the Supreme Court been made applicable to the States by the due process clause of the Fourteenth Amendment. See *Near v. State of Minnesota ex rel. Olsen*, 1931, 283 U. S. 697; *Smith v. People of the State of California*, 1959, 361 U. S. 147, *rehearing denied*, 1960, 361 U. S. 950. In a similar manner the search and seizure prohibition of the Fourth Amendment has been applied to the States. *Mapp v. Ohio*, 1961, 367 U. S. 643, *rehearing denied*, 1961, 368 U. S. 871. Freedom of press and speech is jealously guarded and "The door barring federal and state intrusion into this area cannot be left ajar". *Roth v. United States*, 1957, 354 U. S. 476, at 488. The cases recognize that this freedom, however, is not absolute. For instance, obscenity "is not within the area of constitutionally protected speech or press." *Roth v. United States*, supra, p. 485; *Alberts v. State of California*, 1957, 354 U. S. 476; *Near v. State of Minnesota ex rel. Olsen*, supra, and the publication of such material may be regulated by the States. In enforcing such regulations, the State is not limited "in resorting to various weapons in the armory of the law." *Kingsley Books v. Brown*, 1957, 354 U. S. 436, 441.[5] But such regulations must provide safeguards to prevent the denial of freedom of speech and press since no State has the power to restrict the dissemination of non-obscene publications. *Smith v. People of the State of California*, supra.

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[5] Narrowly upholding §22-a of the Code of Criminal Procedure supplementing the existing criminal provisions by authorizing limited injunctive remedies under closely defined procedural safeguards.

Very much in point is *Marcus v. Search Warrants of Property, etc.*, 1961, 367 U. S. 717, where a number of books and publications allegedly obscene, were seized pursuant to warrants issued to peace officers under a Missouri statute by a magistrate upon a sworn complaint that obscene material was kept in certain places and commanding the officers to bring such material before the magistrate. The proceeding was *ex parte*, as here, and although the obscene material was not identified, a hearing was required to be held within twenty days for the purpose of determining whether the material was obscene. Holding that such mass seizure without any safeguards to protect legitimate expression was in violation of the Fourteenth Amendment which infected the entire proceeding, the court said:

> "* * * The separation of legitimate from illegitimate speech calls for * * * sensitive tools * * *.' Speiser v. Randall, 357 U. S. 513, 525, 78 S. Ct. 1332, 1342, 2 L. Ed. 2d 1460. It follows that, under the Fourteenth Amendment, a State is not free to adopt whatever procedures it pleases for dealing with obscenity as here involved without regard to the possible consequences for constitutionally protected speech" (p. 731).

and again

> "Kingsley Books does not support the proposition that the State may impose the extensive restraints imposed here on the distribution of these publications prior to an adversary proceeding on the issue of obscenity, irrespective of whether or not the material is legally obscene" (pp. 735-736).

In *Bantam Books, Inc. v. Sullivan*, 1963, 372 U. S. 58, the Rhode Island Commission to Encourage Morality in Youth with power to recommend prosecutions, listed certain

publications as objectionable and notified distributors of its adverse findings. The court held that this constituted suppression of the listed publications in violation of the Fourteenth Amendment, remarking that:

> "There is no provision whatever for judicial superintendence before notices issue or even for judicial review of the Commission's determinations of objectionableness. The publisher or distributor is not even entitled to notice and hearing before his publications are listed by the Commission as objectionable" (p. 71).

and that:

> "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity" (p. 70).

The New York State courts have held that even a proceeding under 22-a of the Code of Criminal Procedure, which, in effect, is a civil proceeding addressed to the publication itself, does not permit extensive restraints prior to judicial scrutiny on the issue of obscenity, and that where such prior seizure has been made the proceeding is infected with an unconstitutional taint. *Stengel v. Smith*, 4th Dep't 1963, 18 A. D. 2d 458, 240 N. Y. S. 2d 200. Similarly, such a proceeding does not authorize an *ex parte* injunction. *Tenney v. Liberty News Distributors, Inc.*, 1st Dep't 1961, 13 A. D. 2d 770, 215 N. Y. S. 2d 663. It would be illogical and inconsistent to suppose that prior restraints upon distribution of publications would be unconstitutionally tainted under a 22-a civil proceeding, yet be free from such taint under a 1144 conventional criminal proceeding. Section 1144 is a search and seizure section providing for seizure of not only objectionable material but also of equipment producing and vehicles transporting such material[6] and applies to

[6] Section 1141-c of the New York Penal Law.

seizures subsequent, as well as prior, to conviction. Warrants involving seizure of equipment or gambling paraphernalia, or the like, are not in the same category as warrants involving the seizure of publications subject to the protection of the First Amendment. The issuance of the latter warrants raises the question not only of the possession and use of objectionable material but also of the application of proper standards to determine that probable cause exists that such material is objectionable. *Cf., Smith v. People of the State of California*, supra, and *Marcus v. Search Warrants of Property, etc.*, supra, p. 731.

Here no adversary proceeding or judicial scrutiny or superintendence of any kind was required before the issuance of the warrant. In fact, Section 1144 permits a warrant to be issued by a magistrate "upon complaint that any person within his jurisdiction is offending against the provisions of this article, supported by oath or affirmation * * *". Apparently the complainant determines whether or not the publication is obscene. Pursuant to this authority Anderson filed his complaint but he never saw a copy of the magazine and none was attached to the affidavit. Moreover, his complaint was not based upon his own information but it was based upon hearsay information of a woman worker who had read only portions of the magazine and who in one instance relied upon what was "reputed by fellow workers to be two females". This technique is the procedure that is generally followed by the District Attorney's office in Nassau County according to the affidavit of Henry P. Devine. A warrant based upon such a procedure leaves to the officer executing the warrant the determination of what is obscene, which technique was expressly condemned in *Marcus*. The Court finds that the State in applying Section 1144 in the manner above described, has used the power of search and seizure as a means of wholesale suppression of allegedly obscene and pornographic material

prior to any adversary proceeding or a judicial scrutiny or superintendence so necessary for the protection of non-obscene material. Such application is a clear violation of the Fourteenth Amendment.

The defendant has urged that this Court abstain from taking jurisdiction of the case because the plaintiff has adequate remedies in the State court and accordingly contends that the proceeding should be stayed pending the determination of the criminal proceedings now before the State court. There is no merit to this contention. That the State law affords judicial remedies subsequent to seizure, would not save the statute. Such a proceeding was available and pending under the Missouri statute challenged in *Marcus*. "Moreover, the availability of a judicial remedy for abuses in the system of licensing still leaves that system one of previous restraint which, in the field of free speech and press, we have held inadmissible." *Cantwell v. State of Connecticut*, 1940, 310 U. S. 296, 306; see also *McNeese v. Board of Education for Community Unit School District 187*, 373 U. S. 668; *Monroe v. Pape*, 1961, 365 U. S. 167.

III.

As to the remedy, this Court will abstain from enjoining the prosecution of the criminal actions pending in the State courts and from granting plaintiff's request for declaration that Penal Law, §1141 may not be constitutionally applied to this publication. The latter question is not before this Court and remains to be determined. However, the seizure of plaintiff's publication on April 24th under Section 1144 as applied, being a violation of the Fourteenth Amendment, which infected the entire proceeding, the plaintiff is entitled to an order (1) requiring the defendant to return all copies of the seized publication and (2) enjoining the defendant

from any future interference with the distribution of the No. 32 issue of the Evergreen Review prior to a judicial determination of its obscenity. See *In re Louisiana News Company*, E. D. La. 1960, 187 F. Supp. 241; *Stengel v. Smith*, supra. The remaining claims set forth in the complaint and in 1(b) of defendant's motion to dismiss the complaint are hereby remanded to Judge Rosling for determination. See 3 Moore, Federal Practice §18.07[2].

Settle order on two days' notice.

PAUL R. HAYS,
United States Circuit Judge.
J. R. BARTELS,
United States District Judge.
GEORGE ROSLING,
United States District Judge.